

STATE OF MICHIGAN
COURT OF APPEALS

In re FENTON/GRAF/ZAMBO, Minors.

UNPUBLISHED
December 18, 2014

No. 319696
Wayne Circuit Court
Family Division
LC No. 13-512802-NA

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

The four minor children appeal as of right¹ the trial court's order finding that there was not clear and convincing evidence to terminate respondent-father's parental rights to the youngest child or to terminate respondent-mother's parental rights to all four children. We affirm.

"To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). The trial court's findings are reviewed for clear error. *Id.* at 33. "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* "Further, regard is to be given to the special opportunity of the trial court to

¹ The children first filed their claim on December 23, 2013. This Court originally dismissed the appeal after determining that the trial court's order was not appealable as of right. *In re Fenton/Graf/Zambo*, unpublished order of the Court of Appeals, entered February 14, 2014 (Docket No. 319696). We subsequently denied reconsideration. *In re Fenton/Graf/Zambo*, unpublished order of the Court of Appeals, entered April 15, 2014 (Docket No. 319696). The children sought leave to appeal to our Supreme Court. In lieu of granting leave, our Supreme Court vacated this Court's orders and remanded the case to this Court with an order to "either reinstate the children's claim of appeal or explain why the children do not have an appeal of right[.]" *In re Fenton/Graf/Zambo*, 496 Mich 853, 853-854; 847 NW2d 241 (2014). On June 25, 2014, this Court reinstated the children's appeal as of right. *In re Fenton/Graf/Zambo*, unpublished order of the Court of Appeals, entered June 25, 2014 (Docket No. 319696).

judge the credibility of the witnesses who appeared before it.” *Id.*; see also MCR 2.613(C) and MCR 3.902(A).

The children first argue that the trial court clearly erred by failing to terminate respondent-father’s parental rights under MCL 712A.19b(3)(k)(ix), which allows termination of parental rights if “[t]he parent abused the child or a sibling of the child and the abuse included . . . [s]exual abuse as that term is defined in . . . MCL 722.622.”² Here, HF testified that respondent-father forced her to touch his penis multiple times. She also testified that she told respondent-mother about the sexual abuse, and that she did not feel respondent-mother protected her. However, respondent-father denied the allegations. Respondents’ both testified that they believed HF made up the allegations because she was upset. Accordingly, the trial court was essentially faced with a credibility determination between HF and respondents. On review, this Court must give due regard to the unique opportunity of the trial court to judge the credibility of those witnesses who appeared before it. *Ellis*, 294 Mich App at 33. Given that the evidence regarding whether these incidents occurred conflicted, the trial court did not clearly err when it found no clear and convincing evidence that respondent father had sexually abused HF.³

Next, the children argue that the trial court clearly erred by failing to terminate respondents’ parental rights under MCL 712.A.19b(3)(j), which allows termination if “[t]here is a reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he or she is returned to the home of the parent.” With regard to respondent-father, the children argue that his sexual abuse of HF places the other female children at risk of future harm. Further, the children argue that his physical abuse of EJJ places him at risk of future

² MCL 722.622(w) defines “sexual abuse” as “engaging in sexual contact or sexual penetration as those terms are defined in . . . MCL 750.520a, with a child.” MCL 750.520a(q) defines “sexual contact” as “the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification” Thus, HF’s testimony that respondent-father forced her to touch his penis would qualify as sexual contact as defined in MCL 712A.19b(k)(ix).

³ Further, the fact that the trial court found by a preponderance of the evidence that HF had been sexually abused does not mean that there was clear and convincing evidence to support the same. Generally, the allegations of a petition must be proven by a preponderance of the evidence, MCR 3.972(C)(1); MCR 3.977(E)(2); *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004), but the allegations establishing a statutory basis for termination of parental rights must be shown by clear and convincing evidence, MCR 3.977(E)(3); MCR 3.977(F)(1)(b); MCR 3.977(H)(3); *In re Moss Minors*, 301 Mich App 76, 80; 836 NW2d 182 (2013). Here, the trial court expressly found that there *was* a preponderance of the evidence supporting the court’s decision to take jurisdiction, but there *was not* clear and convincing evidence of grounds for termination. Because clear and convincing is a more demanding evidentiary standard than preponderance, the trial court did not conclusively determine that HF was sexually abused when it took jurisdiction of the children. The children’s arguments to the contrary are without merit.

harm. With regard to respondent-mother, the children argue that respondent-mother does not believe HF was sexually abused, that she denies that respondent-father physically abused EJG, and that she intends to remain married to and cohabit with respondent-father. The children argue that, because the sexual and physical abuse occurred (as found by the trial court during the jurisdictional phase), the fact that respondent-mother denies that they occurred and still wishes to remain with respondent-father amounts to clear and convincing evidence that further harm will likely occur unless respondent-mother's parental rights are terminated. However, although HF testified to the sexual abuse and EJG testified to being choked by respondent-father, respondents denied the allegations. Again, the testimony presented amounts to a credibility battle that the trial court resolved in favor of respondents. See *Ellis*, 294 Mich App at 33.⁴ Accordingly, we are not left with a definite and firm conviction that the trial court erred in finding that MCL 712A.19b(3)(j) was not established by clear and convincing evidence.⁵

Finally, the children argue that the trial court clearly erred by failing to find that termination of respondents' parental rights would be in their best interests. However, because the trial court did not clearly err in regard to the statutory grounds, it is unnecessary to consider this issue. See MCL 712A.19b(5); *In re Olive/Metts, minors* 297 Mich App 35, 40; 823 NW2d 144 (2012) ("Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights.").

Affirmed.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

⁴ Again, we note that although the trial court found that there was a preponderance of the evidence that HF had been sexually abused, that finding does not conclusively establish clear and convincing evidence supporting termination. See note 3, *supra*.

⁵ We reject the children's alternative argument that the trial court's findings of fact were deficient. Here, the trial court expressly stated that it found that the evidence of neglect and abuse was proven by a preponderance of the evidence, the standard applicable to the jurisdictional phase, *In re MU*, 264 Mich App 270, 278; 690 NW2d 495 (2004); however, it then expressly stated that the evidence did not satisfy the clear and convincing standard applicable at the statutory grounds phase, *Ellis*, 294 Mich App at 32. No further explanation was required.